FILED
MAY 28 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. [redacted] 84

CHARLES M. JACKSON,

Petitioner

versus

AMERICAN FIRE AND CASUALTY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

J. Y. SANDERS, JR.
BEN R. MILLER

Attorneys for Plaintiff-Petitioner.

BEN R. DOWNING, JR.
ALVIN B. RUBIN
R. GORDON KEAN, JR.

Of Counsel.

Franklin Press, Inc., Baton Rouge, La.

Page

tioner's right to trial by jury and in conflict with the principle that the trial court's approval of the award of damages will not be disturbed on the grounds that the damages are excessive or inadequate 15

Summary 20

TABLE OF CASES CITED

American Fire & Casualty Co. v. Jackson, 187 F. 2d 379 10, 12

Bailey v. Central Vermont Railway, Inc., 319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444 7

Bartholomew v. Imparto, 12 So. 2d 700 16

Browne v. Rosenfield's, Inc., La. App., 42 So. 2d 885 13

Cailleteau v. Hightower, 181 So. 617 18

Dowell, Inc. v. Jowers (C.C.A. 5th), 166 F. 2d 214 18

Dowell, Inc. v. Jowers (C.C.A. 5th), 182 F. 2d 576 ..... 8, 16

Erie R. Co. v. Thompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 17

Fairmount Glass Works v. Cub Fork Coal Company, 287 U.S. 474, 53 S. Ct. 252, 77 L. Ed. 439 ..... 8, 15, 16, 20

Grand Trunk Western R. Co. v. Heattie (C.C.A. 6th), 48 F. 2d 759 9

Guidry v. Hamlin, La. App., 188 So. 662 13

Heller v. Select Lake City Theatre Operating Co. (C.C.A. 7th), 187 F. 2d 649 8

Hill v. Railway Express Agency, 187 F. 2d 184 15

Home Insurance Co. of New York v. Tydal Co., 157 F. 2d 851 9

Jacob v. City of New York, 315 U.S. 752, 62 S. Ct. 854, 86 L. Ed. 1166 (1942) 19

George E. Keith Co. v. Abrams (C.C.A. 3rd), 43 F. 2d 557 9

Lavender v. Kurn, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916 ..... 7, 8, 14

Mercer v. Tremont & G. Ry. Company, 19 So. 2d 270 12

Mills v. Heidingsfield, 192 So. 786 12

Reid v. Nelson (C.C.A. 5th), 154 F. 2d 724 ..... 8, 17

Shewmaker v. Capital Transit Co., 143 F. 2d 142 8

Page

Steber v. Kohn (C.C.A. 7th), 149 F. 2d 4 8
Tenant v. Peoria & P.U. Ry. Co., 321 U.S. 29, 64 S. Ct. 409, 88 L. Ed. 520 7
Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 63 S. Ct. 444, 87 L. Ed. 610 7
Wilkerson v. McCarthy, 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497 ..... 7, 8

STATUTES

28 U.S.C.A. 1254 6
28 U.S.C.A. 2101 6
Article 2315, Civil Code of the State of Louisiana, Revision of 1870 ..... 2, 11
Article 2316, Civil Code of the State of Louisiana, Revision of 1870 ..... 2, 11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No.

CHARLES M. JACKSON,

Petitioner

versus

AMERICAN FIRE AND CASUALTY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Mr. Charles M. Jackson, acting in his capacity as administrator of the estate of his minor daughter, Linda Jackson, plaintiff, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit (Circuit Judge Russell dissenting), entered in the above entitled cause on March 6, 1951 (R. 143), reversing the judgment

of the District Court for the Eastern District of Louisiana, entered for plaintiff on April 20th, 1950 (R. 20), and the order of the District Court for the Eastern District of Louisiana denying motions of defendant to dismiss, for a directed verdict, and for a new trial, entered May 5th, 1950 (R. 134). The judgment of the Court of Appeals herein complained of remanded the cause with instructions.

STATEMENT OF MATTERS INVOLVED

Plaintiff, Charles M. Jackson, filed this tort action under the provisions of Article 2315 and Article 2316 of the Revised Civil Code of the State of Louisiana, seeking to recover damages from the American Fire and Casualty Company, as the liability insurer of the Carson Furniture Company, Inc., for personal injuries sustained by his daughter, Linda Jackson, aged eleven months at the time of the accident sued on. The child was injured on March 20th, 1949, when she fell from the mezzanine of the furniture store, through an opening in the guard rail, approximately eight feet to the concrete covered first floor of the establishment, thereby suffering serious and possible permanent injuries to the head.

Plaintiff predicated his suit on the theory that the child, Linda Jackson, was an invitee on the premises occupied by the furniture store, that the guard rail through which she fell was inadequate for the purpose intended, and that the sole and proximate cause of the accident was the failure of the Carson Furniture Company, Inc. to exercise ordinary care in maintaining its premises in a reasonably safe condition.

The answer on behalf of the American Fire and Casualty Company is one of general denial. In the alternative, the defen-

dant pleaded contributory negligence of the plaintiff, his wife, and the minor child, Linda Jackson.

The matter was first heard before Honorable Herbert W. Christenberry, District Judge, on defendant's motion to dismiss and alternative motion for summary judgment (R. 7-9), which were denied by order entered on January 5th, 1950 (R. 10). After answer filed, the cause was tried to a jury before Honorable J. Skelly Wright, District Judge (R. 18-20).

There was no conflicting testimony, and all of the evidence introduced was in plaintiff's behalf. The sole issues before the jury and arising out of the undisputed facts were: (1) the status of the child, Linda Jackson, at the time of the accident sued on, and (2) depending upon the status of the child, whether the Carson Furniture Company, Inc., as the operator of the premises, had breached any duty for which there could be recovery in law.

The evidence adduced, insofar as it relates to the negligence of the Carson Furniture Company, Inc., showed that the accident occurred on the premises of the furniture store at approximately 12:30 p.m., March 20th, 1949, and resulted when the child, then aged eleven months, fell between the base of the stair leading to the mezzanine and the middle railing of the stair guard rail, an opening of 27½ inches. Additional evidence presented the following facts:

First: That Linda Jackson had an undisputed right to the use and possession of the premises, and was there by the express or implied invitation of the president and controlling stockholder of the Carson Furniture Company, Inc., L. L. Carson (R. 100), and of its manager, her father (R. 63).

Second: That the mezzanine, from which Linda Jackson fell, was used both for living quarters and display purposes, and the responsible officers of the company well knew that the mezzanine and the stairs leading to it would be used by small children generally and Linda Jackson in particular (R. 39, 62, 105).

Third: That there was an unprotected opening of 27½ inches between the bottom of the step and the middle rail (R. 56).

Fourth: That the construction of the stair guard rail was not a customary method of construction, and that the usual space was 13 to 14 inches, with a preferable design being a solid plaster or concrete guard rail. (Testimony of William Smith, Licensed Architect, R. 111-116).

Fifth: That additional rails were added immediately after the accident (R. 42, 57, 68).

Sixth: That the construction of the stair and guard rail, with large unprotected openings between the rails, was an unsafe method of construction in a building used as a furniture store and in an area where the presence of small children could be expected (R. 47, 115).

Seventh: That the child was seriously injured (R. 79-85).

The case was submitted to the jury (in the words of the charge by the trial judge) (R. 122-130) on the issue of whether "the premises in question were reasonably safe for the purpose intended."

The jury found for the plaintiff, and returned an award in the sum of $6,500.00 (R. 19-20). A ruling on defendant's

motion to dismiss and for a directed verdict was reserved, and subsequently denied (R. 134).

Defendant thereupon appealed to the United States Court of Appeals, Fifth Circuit. That Court, despite the fact that it agreed with appellee that Linda Jackson was an "invitee" on the premises of the furniture store at the time of the accident, held that no negligence was shown, reversed the judgment of the District Court and remanded the cause with instructions (R. 143-151). Circuit Judge Russell dissented (R. 151).

Plaintiff's application for a rehearing was timely filed, and subsequently denied. Circuit Judge Russell again dissented (R. 161).

QUESTIONS PRESENTED

The primary question involved in this application for a writ of certiorari is whether the United States Court of Appeals, Fifth Circuit, exceeded its appellate jurisdiction in reversing the judgment of the District Court on a question of fact, thereby depriving the plaintiff of the right to trial by jury guaranteed to him and his minor daughter, Linda Jackson, by the Seventh Amendment to the Constitution of the United States.

A further question involved in this application for a writ of certiorari is whether the United States Court of Appeals, Fifth Circuit, exceeded its appellate jurisdiction in holding that the jury award was excessive, and in holding that a claim based on permanent injury cannot be sustained except where specially pleaded.

STATEMENT OF JURISDICTION

(1) This Court has jurisdiction to consider and grant this

petition pursuant to Title 28, United States Code Annotated, Section 1254.

(2) The original date of the judgment sought to be reversed is March 6th, 1951 (R. 143). The petition for rehearing was filed March 23rd, 1951, within the time provided for by the rules of the United States Court of Appeals, Fifth Circuit (R. 153), and the petition for rehearing was denied (Circuit Judge Russell dissenting) on April 2, 1951 (R. 161). The petition for certiorari was filed within the time prescribed by Title 28, United States Code Annotated, Section 2101.

(3) Petitioner further shows that the question presented by this application for a writ of certiorari is of general public importance; that the Court of Appeals herein has reversed the District Court solely on a question of fact as to whether there was sufficient evidence of negligence and of permanent injury; that in reweighing the evidence submitted to the jury, the Court of Appeals has deprived petitioner of his constitutional right to trial by jury and established a precedent for the review of future cases on appeal in the Fifth Circuit, which, if permitted to stand, is in conflict with the Constitution of the United States and with the applicable decisions of this Court.

SPECIFICATION OF ERRORS

The Court of Appeals erred:

(1) In reversing the judgment of the District Court and in setting aside the jury verdict, when the record clearly revealed that **substantial** evidence had been introduced tending to prove the allegations of plaintiff's complaint.

(2) In finding as a fact that "no negligence was shown."

(3) In reweighing the evidence submitted to the jury.

(4) In holding that the jury verdict was excessive, where no abuse of the trial Court's discretion was found.

(5) In holding that the cases of *Guidry v. Hamlin*, La. App., 188 So. 662, and *Brown v. Rosenfield's, Inc.*, La. App., 42 So. 2d 885, were applicable to the case at bar.

(6) In refusing to apply the established jurisprudence relative to invitee relationship, after finding that plaintiff's daughter was an "invitee" on the premises.

REASONS RELIED ON FOR GRANTING THE WRIT

(1) The conclusion of the Court of Appeals that "no negligence was shown" was a finding of fact, contrary to the evidence, and a re-examination of facts tried to the jury, otherwise than according to the rules of common law, in violation of the Seventh Amendment as interpreted by this Court.

Bailey v. Central Vermont Railway, Inc., 319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444.

Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 63 S. Ct. 444, 87 L. Ed. 610.

Tenant v. Peoria & P.U. Ry. Co., 321 U.S. 29, 64 S. Ct. 409, 88 L. Ed. 520.

Lavender v. Kurn, 327 U.S. 645, 66 S. Ct. 140, 90 L. Ed. 916.

Wilkerson v. McCarthy, 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497.

(2) The decision of the Court of Appeals is in conflict with the well established jurisprudence of this Court, and of Courts of Appeals in other Circuits, that a motion to direct a verdict presents a single question, whether there is in the record any evidence which, standing alone, and with all its

intendments most favorable to the party resisting the motion, tends to prove the material elements of the case declared upon.

Wilkerson v. McCarthy, 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497.

Heller v. Select Lake City Theatre Operating Co. (C.C.A. 7th), 187 F. 2d 649.

Steber v. Kohn (C.C.A. 7th), 149 F. 2d 4.

Lavender v. Kurn, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916.

Shewmaker v. Capital Transit Co., 143 F. 2d 142.

(3) The decision of the Court of Appeals violates the well settled principle that the federal appellate court is not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because the Court regards another result as more reasonable.

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916.

Dowell, Inc. v. Jowers (C.C.A. 5th), 182 F. 2d 576.

(4) The decision of the Court of Appeals that the jury award was excessive constituted a re-examination of the facts tried to the jury and was in conflict with the principle established by the decisions of this Court, and of other Circuit Courts of Appeals, as well as its own, that an award of damages is not subject to re-examination in a Federal Appellate Court and the trial court's approval will not be disturbed on the grounds that the damages were excessive or inadequate.

Fairmount Glass Works v. Cub Fork Coal Company, 287 U.S. 474, 53 S. Ct. 252, 77 L. Ed. 439.

Reid v. Nelson (C.C.A. 5th), 154 F. 2d 724.

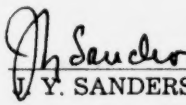
Dowell, Inc. v. Jowers (C.C.A. 5th), 182 F. 2d 576.

Home Insurance Co. of New York v. Tydal Co. (C.C.A. 5th), 157 F. 2d 851.

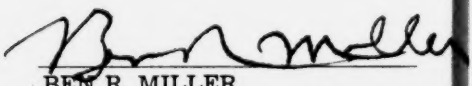
Grand Trunk Western R. Co. v. Heattie (C.C.A. 6th), 48 F. 2d 759.

George E. Keith Co. v. Abrams (C.C.A. 3rd), 43 F. 2d 557.

WHEREFORE, it is respectfully submitted that this petition for certiorari to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.



J. Y. SANDERS, JR.



BEN R. MILLER

Attorneys for Plaintiff-Petitioner.

BEN R. DOWNING, JR.
ALVIN B. RUBIN
R. GORDON KEAN, JR.

Of Counsel.

Baton Rouge, Louisiana,

May 16, 1951.

Brief follows:

BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI

STATEMENT

This is an application for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit reversing a judgment of the United States District Court for the Eastern District of Louisiana.

The material facts and the questions involved are set forth in the foregoing petition. The specification of errors there set forth is here adopted as part of this brief.

THE DECISION BELOW

The opinion of the Court of Appeals (R. 143) is reported in 187 F. 2d 379.

STATEMENT OF JURISDICTION

The statement of jurisdiction set forth in the foregoing petition is here adopted as a part of this brief.

QUESTIONS PRESENTED

The principal questions presented involve the issue of whether the federal appellate court is free to re-examine facts tried to the jury.

CONTENTIONS OF PETITIONER

Petitioner contends that the verdict of the jury in this case was reasonably in accord with the evidence submitted, and that the United States District Court for the Eastern District of Louisiana was correct in denying defendant's motion to

dismiss, for a directed verdict and for a new trial, and in entering a judgment for plaintiff. Petitioner further contends that the judgment of the Court of Appeals for the Fifth Circuit, reversing the judgment of the District Court, is not only erroneous in its interpretation and application of the Louisiana law but completely ignores the principle of jury trial established by the Seventh Amendment to the Constitution and as safeguarded by the decisions of this Court.

Petitioner respectfully suggests that if the jury findings, as in this case, are to be so lightly regarded as to be susceptible of reversal merely because the federal appellate court might find another result more reasonable, the meaning and intent of the Seventh Amendment would be soon lost.

In this litigation, plaintiff instituted suit to recover damages for personal injuries sustained by his daughter, aged eleven months at the time of the accident. His right to recover was predicated upon the provisions of Article 2315 and Article 2316 of the Civil Code of the State of Louisiana, Revision of 1870, the pertinent portions of which read as follows:

> "Art. 2315—Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; . . ."
>
> "Art. 2316—Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill."

Two questions were presented by the pleadings: (1) The status of the child, Linda Jackson, and (2) depending thereon, whether there was any negligence on the part of the Carson Furniture Company or its officers for which there could be recovery under the above cited provisions.

The whole evidence was to the effect that there was a mutuality of interest between the presence of the child, Linda Jackson, and the Carson Furniture Company, Inc., sufficient to clothe her with the status of an "invitee" on the premises. Her presence resulted from an invitation "extended by reasons of the owner or occupant doing something or permitting something to be done which fairly indicates to the person that his entry and use of the property is consistent with the intentions and purposes of the owner or occupant, and leads him to believe that the use is in accordance with the design for which the place is adapted or allowed to be used in mutuality of interest." (*Mills v. Heidingsfield*, 192 So. 786.) The jury apparently found that Linda Jackson was an invitee, since a specific charge thereon (Plaintiff Charge No. 1, R. 128) was requested by plaintiff and given by the trial judge (R. 128). The Court of Appeals strangely sustained this finding of fact by the jury and held as follows:

> "We agree with appellee: that plaintiff's wife and Linda were on the premises not as mere licensees but, as the wife and daughter of plaintiff, and sub-tenant of Carson, there by invitation of plaintiff and of Carson, the lessee of Wilson, lessor and owner of the premises; and that Wilson and Carson, Inc., and, therefore, the defendant, the insurer, would have been liable if Linda's injuries had been caused by their negligence as alleged." (187 F. 2d 383.)

The duty of the Carson Furniture Company, Inc., under such a finding, has been clearly set forth in the multiple decisions of the Louisiana Courts. One example is the case of *Mercer v. Tremont & G. Ry. Company*, 19 So. 2d 270, wherein the Court stated the principle thus:

> "If, however, it is found that the injured party occupied the status of an invitee, then the duty of the defendant is

correspondingly greater, requiring defendant to use ordinary care in maintaining its premises in a reasonably safe condition for such use by the invitee as is consistent with his purpose. 38 Am. Juris., Negligence, Sec. 96, page 754."

Petitioner contends that in this state of the record it became only necessary that the Court of Appeals find **some** evidence of negligence on the part of defendant's assured. Petitioner contends that there was substantial evidence bearing upon the negligence of Carson Furniture Company, Inc. The testimony of the architect, William Bailey Smith (R. 114-115), furnished, in itself, ample foundation for a finding by the jury that the maintenance of stairs which would be used by small children generally and Linda Jackson in particular, with an unprotected gap of 27½ inches between the bottom of the steps and the rail, was a breach of the duty to use ordinary care in providing reasonably safe premises and therefore negligence within the meaning of Article 2315 and Article 2316 of the Revised Civil Code of the State of Louisiana.

The Louisiana decisions cited and relied on by the Court of Appeals in reversing the District Court are without application here. Those decisions (*Guidry v. Hamlin*, 188 So. 662, and *Browne v. Rosenfield's, Inc.*, 42 So. 2d 885) were handed down by Louisiana appellate courts, sitting as triers of fact as well as law. What these Louisiana decisions held were that under the facts then before the Court, no negligence was shown. In reaching the same conclusion in this litigation, the Court of Appeals for the Fifth Circuit has likened itself unto a Louisiana appellate court. Such procedure is now and always has been inhibited by the Seventh Amendment of the Constitution and the decisions of this Court safeguarding the right of trial by jury. The appellate court's function in the review of jury cases tried under federal law has been clearly enunciated in

the case of *Lavender v. Kurn*, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916, wherein Mr. Justice Murphy, as organ of the Court, stated:

> "It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. See *Tiller v. Atlantic Coast Line R. Co.* 318 US 54, 67, 68, 87 L ed 610, 617, 618, 63 S Ct 444, 143 ALR 967; *Bailey v. Central Vermont R. Co.* 319 US 350, 353, 354, 87 L ed 1444, 1447, 1448, 63 S Ct 1062; *Tennant v. Peoria & P. U. R. Co.* 321 US 29, 35, 38 L Ed 520, 525, 64 S Ct. 409, 15 NCCA (NS) 647. See also Moore, 'Recent Trends in Judicial Interpretation in Railroad Cases under the Federal Employers' Liability Act,' 29 Marquette L. Rev 73.
>
> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference.
>
> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or dis-

believe whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

In accord is the recent statement by the United States Court of Appeals, Seventh Circuit, in the case of *Hill v. Railway Express Agency, Inc.*, 187 F. 2d 184:

> "We have a feeling that the varying phraseology used in stating the test to be employed by a reviewing court in passing upon the action of a trial court in allowing or denying a motion for a directed verdict is a play upon words, and that the apparent conflict is more fanciful than real. All parties agree that it is particularly the province of the jury to weigh the evidence and determine the credibility of witnesses. And we think it is sufficient on review if there is evidence which, if given credence by the jury, supports the charge of negligence."

The Court of Appeals for the Fifth Circuit not only ignored and disregarded these recognized principles in relation to the "fact" of negligence, but in addition, the opinion of the majority of the Court would set aside the jury verdict as being excessive. That such review by a federal appellate court is error, save in possible cases of manifest abuse of the trial court's discretion, has only recently been held by this Court in the case of *Fairmount Glass Works v. Cub Fork Coal Company*, 287 U.S. 474, 53 S. Ct. 252, 77 L. Ed. 439. In the cited decision, this Court stated the principle thus:

> "Third. It is urged that the refusal to set aside the verdict was an abuse of the trial court's discretion, and hence reviewable. The Court of Appeals has not declared that the trial judge abused his discretion. Clearly the mere refusal to grant a new trial where nominal damages

> were awarded is not an abuse of discretion. This Court has frequently refrained from disturbing the trial court's approval of an award of damages which semed excessive or inadequate, and the circuit courts of appeals have generally followed a similar policy. Whether refusal to set aside a verdict for failure to award substantial damages may ever be reviewed on the ground that the trial judge abused his discretion, we have no occasion to determine."

The many decisions cited in support of the rule attest to its universal application. (See Notes 5 and 13, *Fairmount Glass Works v. Cub Fork Coal Company*, 77 L. Ed. at pp. 443 and 447.)

According to the rules of common law, the assessment of damages for injuries sustained has long been a discretion vested in trial judges and juries. So even stated the Court of Appeals for the Fifth Circuit in the recent case of *Dowell, Inc. v. Jowers* (C.C.A. 5th), 182 F. 2d 576:

> "No error of law appearing upon the record, this court cannot reverse the judgment because we may be of the opinion that the jury should have returned a verdict for a less amount. Whether the trial court's action in overruling the motion for a new trial was erroneous or not our power is restricted to the determination of questions of law arising upon the record. The trial court did not err in refusing to instruct the jury as to amounts that have been awarded by the courts of Louisiana in similar actions."

From the very nature of such claims resulting from negligent injury there can be no exact predetermined amount or uniform rule of valuation. Each case, of necessity, turns on its own merits, depends upon the medical history of the injured plaintiff and the evaluation to be given the medical testimony. By way of illustration, in the case of *Bartholomew v. Imparto*,

12 So. 2d 700, cited by the Court of Appeals, the Louisiana Court concluded that the medical evidence indicated no permanent injury as a "fact." Other reasonable men hearing the same testimony might logically conclude that the evidence warranted a finding of permanent injury and that the damages awarded were entirely inadequate. So likewise in the instant case, the uncontroverted testimony of Dr. Van Gelder (R. 85), supported by that of the mother (R. 89), was such that the jury could reasonably infer that permanent injury had resulted from the accident, and that compensation should be awarded for that purpose.

Petitioner is unaware of any holding by this court or any other federal court that the amount of the jury award in federal cases must be predicated on amounts awarded by the state courts in similar actions.

To the contrary, in the case of *Reid v. Nelson*, 154 F. 2d 724, relied on by the Fifth Circuit in the *Jowers* case, the defendant urged (as defendant did here) that the doctrine of *Erie R. Co. v. Thompkins*, 304 U.S. 64, 58 S. Ct. 817, required that "federal courts in diversity cases should follow the state supreme court, which holds that it is the right and duty to consider the question of excessiveness. . . ." The Court answered this argument thus:

> "The decision in *Erie R. Co. v. Thompkins*, supra, could not have the effect of requiring this Court to follow the State Court in disregard of the Seventh Amendment." (154 F. 2d 724 at p. 726.)

Even if this were not so it is apparent from a casual reading of the cases cited by the Court of Appeals, and of the Louisiana cases generally, that there is no Louisiana law as to quantum of damage as distinguished from Louisiana law with

reference to the elements of damage. The many and varied Louisiana decisions as to quantum attest to the fact that the assessment of damages for personal injury and pain and suffering follows no uniform rule but is left to the sound discretion of judge and jury, as it must of necessity be. As stated in the case of *Cailleteau v. Hightower*, 181 So. 617, by the Court of Appeal of Louisiana for the Second Circuit:

> "As has been many times stated, there is no fixed rule to be governed by in awarding damages. . . ." (181 So. at p. 617.)

This principle was further recognized by the Court of Appeals for the Fifth Circuit in the case of *Dowell, Inc., v. Jowers*, 166 F. 2d 214, wherein it was stated:

> "There can be no exact rule for measurement of damages applicable to all cases, for the facts of each case must be the basis upon which the award is predicated. *McMahon v. N.O. Ry. & Light Co.*, 127 La. 544, 53 So. 857, 32 LRA.N.S. 346."

All of the testimony adduced in this case was to the effect that the injuries sustained by Linda Jackson at the time of the accident and the pain and suffering by her subsequent to the accident were extensive. The instructions to the jury clearly and correctly set forth the four elements of damage which the jury could consider. It would be mere conjecture at this point to assay what portion of the quantum is attributed to each. And the defendant failed to utilize procedures open to it by way of requests for special findings to determine, for instance, if the jury's award was predicated in part on a finding of permanent injury.

The Court of Appeals did not find an abuse of discretion on the part of the trial judge. It can hardly be said that the

refusal to set aside an award of Six Thousand Five Hundred ($6,500.00) Dollars for the serious injuries involved in this litigation was an abuse of discretion.

What the Court of Appeals held was merely that permanent injury had neither been pleaded nor proven. Just how the Court determined that the jury award was based on permanent injury is difficult to understand, since the defendant had asked for no special findings by the jury on this element of the damages. The only logical conclusion is that the Court of Appeals, in disregard of its own previous decisions and of the principles of appellate jurisdiction as relates to jury awards and set forth in the *Fairmount* case, supra, has now established the rule that the federal courts in Louisiana are bound by amounts awarded by the courts of Louisiana in similar actions.

Petitioner respectfully submits that such a precedent, if permitted to stand, would divest the federal trial courts in Louisiana of a historic discretion in the handling of jury trials.

The recent decisions cited in support of the application for writ of certiorari suggest a growing concern by this Court for safeguarding the right to trial by jury as set forth in the Seventh Amendment of the Constitution of the United States. So stated this Court in the case of *Jacob v. City of New York*, 315 U.S. 752, 62 S. Ct. 854 (1942):

> "The right of jury trial in civil cases at common law is a basis and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by Statute, should be jealously guarded by the Court."

The Louisiana jurisprudence and the two Louisiana-trained District Judges who heard the case at bar in effect agreed that

petitioner had made a case for the jury. So likewise apparently did Circuit Judge Russell, who dissented from the decision herein sought to be reviewed.

The action of the majority of the judges of the Court of Appeals who heard the case is clearly violative of the Seventh Amendment to the Constitution and clearly does not follow the announced principles of this Court in the cited cases. To permit this decision to stand as now written, would lay open the recognized principles of jury trial to such appellate encroachment as would in time make mockery of the constitutional right to trial by jury. By its decision that the jury award was excessive, the Court of Appeals suggests that federal courts sitting in Louisiana should be mere additional arms of the state judiciary in tort actions arising in Louisiana and triable in the federal courts. That the decision of this Court in the case of *Erie R. Co. v. Thompkins*, supra, had no such intendment is self evident by the later expression of this Court in the Fairmount case, supra, to the following effect:

> "First. The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals."

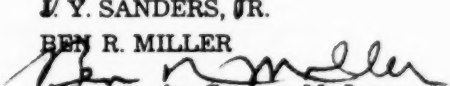
SUMMARY

For the above reasons, it is respectfully submitted that the decision of the Court of Appeals is manifestly erroneous. The questions here at issue are of such importance that this

Court should exercise its discretionary powers to correct the errors herein complained of and reinstate the judgment of the District Court. The petition for certiorari should, therefore, be granted.

Respectfully submitted,

J. Y. SANDERS, JR.



BEN R. MILLER

Attorneys for CHARLES M. JACKSON,
Plaintiff-Petitioner.

BEN R. DOWNING, JR.
ALVIN B. RUBIN
R. GORDON KEAN, JR.

Of Counsel.